rights, or rights analogous, have been widely extended. Such an assignment of liens as is suggested seems merely to give proper effect to such rights. It can make no difference to the owner of the goods to whom he must pay his indebtedness, and whether the goods are in the hands of an assignee or a bailee, he can still hold the original lienholder responsible for their safety. On the other hand, it may be of the utmost importance to the lienholder that, by an assignment which gives his assignee all the rights he himself possesses, he can at once raise funds on a just debt. Under these circumstances, since no distortion of legal principles nor perversion of policy is involved, such assignments of liens ought to be recognized.

RECENT CASES.

AGENCY — DAMAGES — PUNITIVE DAMAGES FOR AGENT'S TORT. — The plaintiff came to the defendant's place of business with a wagon load of goods to sell. The defendant's servant ordered him to leave the premises, and on his refusal, struck him in an unjustifiable manner. *Held*, that in an action against the master, punitive damages were properly awarded. *Boyer* v. *Coxen*, 48 Atl. Rep. 161 (Md.).

The doctrine of punitive damages is opposed to sound legal principle, but is nevertheless supported by the weight of authority. See 2 GREENL. EV., 16th ed., § 253, n. 2. The object of such an award is to punish the defendant and thus protect society against wanton violations of personal rights and social order; therefore, some wilful or malicious wrongdoing by the defendant is generally held necessary. *Voltz* v. *Blackmar*, 64 N. Y. 440. The express authorization of the servant's tort by the master, and perhaps the employment of a palpably unfit man, may be regarded as making him sufficiently culpable; otherwise however punitive damages should not be awarded against him. *Burns* v. *Campbell*, 71 Ala. 271, 292. The principal case rests upon the theory that all the servant's acts within the scope of his employment are, in the contemplation of the law, the acts of the master. Punitive damages however are given, not as compensation for the injury resulting from the act, but as punishment for the evil motive, and of that the principal here is innocent. Accordingly, even if we accept the doctrine of punitive damages, the principal decision seems unjustifiable. *Grund* v. *Van Vleck*, 69 Ill. 478; *Haines* v. *Schultz*, 50 N. J. Law, 481.

AGENCY — IMPLIED WARRANTY OF AUTHORITY — FORGED POWER OF ATTORNEY. — A stockbroker, acting in good faith under a forged power of attorney purporting to be signed by one Oliver, effected a transfer of stock standing in the Bank of England in Oliver's name. The bank, having made good the loss to Oliver, sued the stockbroker. *Held*, that the stockbroker is liable on an implied warranty of authority, even though the bank had equally good means of knowing of the forgery. *Oliver* v. *Bank of England*, 17 T. L. R. 286.

This decision is of importance to the business world, and is interesting in its application of the well-known doctrine of *Collen* v. *Wright*, 8 E. & B. 647. Theoretically it would seem that the action should be in tort, there being no contract. As there is no such action for innocent misrepresentation however, courts have implied a warranty of authority. *Firbank's Executors* v. *Humphreys*, 18 Q. B. D. 54. This doctrine, though generally acknowledged, has been modified where the agent makes a full disclosure of the facts concerning his authority. *Lilly* v. *Smales*, [1892] 1 Q. B. 456; *Newman* v. *Sylvester*, 42 Ind. 106. The principal case, it would seem, does not come within this exception. On similar facts the doctrine of implied warranty has been held to apply. *Boston, etc., R. R.* v. *Richardson*, 135 Mass. 473. Though such an application extends the doctrine of *Collen* v. *Wright*, *supra*, to cases where one not in reality an agent purports to act as such, it would seem to be correct. The rule which the principal case establishes is practical and in accordance with sound business principles, though in fact it is but a veiled exception to a settled principle in the law of torts. *Farmers' Coöp. Trust Co.* v. *Floyd*, 47 Oh. St. 525.

BANKRUPTCY — NOTES — PROOF AGAINST MAKER AND INDORSER. — The Bankruptcy Act of 1898, § 65 c, provides that where a claim is proved and allowed after a dividend has been declared, it shall not affect such dividend, but if sufficient remains after the payment of the latter, the creditor shall receive an equal dividend before other creditors are paid further. The maker and indorser of a note were both bankrupt. The holder had proved against the estate of the maker after a dividend had been declared. *Held*, that he may prove against the estate of the indorser for the full amount of the note. *In re Swift*, 106 Fed. Rep. 65 (Dist. Ct., Mass.).

Where the maker and indorser of a note are both bankrupt the holder may prove against both for the full amount. *In re Meyer*, 78 Wis. 615. But where, before proving against the indorser's estate, he has proved against the maker's, and a dividend in his favor has been paid or declared, his proof against the indorser's estate must be reduced by so much. *Sohier* v. *Loring*, 6 Cush. 537. The present case decides correctly that the creditor's right to a preference in future dividends is not equivalent to a dividend declared in his favor, since it is uncertain how much, if anything, he will receive from the maker's estate. A right that is for any reason uncertain will not operate to reduce his claim. *In re Hicks*, Fed. Cas. No. 6456.

CARRIERS — CONNECTING CARRIERS — POSSESSION. — Before a train reached its destination an express company's agent took a baggage-check from a passenger, entered the baggage-car, as was his custom, and tied the check to the passenger's trunk. Between that time and its delivery by the express company, the trunk was robbed. *Held*, that the express company is liable to the passenger for the loss. *Springer* v. *Westcott*, 166 N. Y. 117; 59 N. E. Rep. 693.

The lower court went on the principle that the last of a series of connecting carriers must rebut a presumption that goods were received by him as delivered to the first carrier. *Moore* v. *N. Y., etc., R. R. Co.*, 173 Mass. 335. This doctrine is believed to be unsound. *Marquette, etc., R. R. Co.* v. *Kirkwood*, 45 Mich. 51. However it is law in several jurisdictions, of which New York has been supposed to be one. *Smith* v. *N. Y., etc., R. R. Co.*, 41 N. Y. 620. The present case seems within this rule. But the upper court rested its decision upon another ground, holding the express company liable from the moment its agent attached the check, seemingly on the principle that a common carrier becomes liable as such on taking possession, at a point off his route, of goods consigned to a place thereon. *Evansville, etc., R. R. Co.* v. *Androscoggin Mills*, 22 Wall. 594. An ordinary express messenger undoubtedly has possession of parcels in an express car. *Buckland* v. *Adams Ex. Co.*, 97 Mass. 124. But the facts of the principal case are entirely different and show no possession by the agent at the time in question. The position taken seems therefore untenable. The case is interesting as showing a disposition not to follow *Smith* v. *R. R. Co.*, *supra*.

CONFLICT OF LAWS — DIVORCE — JURISDICTION. — The defendant obtained in Oklahoma a divorce from her husband, a resident of New York, and subsequently remarried and returned to New York. Later the first husband sued for divorce in New York. *Held*, that this foreign divorce is invalid and no defence to the present suit. *Winston* v. *Winston*, 165 N. Y. 553; 59 N. E. Rep. 273. See NOTES, p. 66.

CONSTITUTIONAL LAW — JURISDICTION — CONTROVERSY BETWEEN STATES. — The State of Missouri sought to restrain the State of Illinois from operating a sewerage system to the detriment of the inhabitants of the plaintiff state. *Held*, that the State of Missouri is a proper party plaintiff, so as to give the United States Supreme Court original jurisdiction. *Missouri* v. *Illinois*, 21 Sup. Ct. Rep. 331. See NOTES, p. 67.

CONTRACTS — EXCUSE — IMPOSSIBILITY. — The defendants contracted to run cars on their electric road as often as once every half hour. A series of unusually severe snowstorms obliged them to suspend operations for a time. *Held*, that there was an implied condition relieving the defendants from liability when, without their fault, performance was rendered impossible. *Buffalo, etc., Co.* v. *Bellevue, etc., Co.*, 165 N. Y. 247; 59 N. E. Rep. 5. See NOTES, p. 63.

CONTRACTS — MISTAKE OF LAW — UNCONSTITUTIONAL STATUTE. — A contract with a city contained, in accordance with the requirements of a statute, a stipulation that, if the contractor should fail to pay his workmen the prevailing rate of wages in the locality, the contract should be void. He did not comply with the stipulation. *Held*, that, the statute being unconstitutional, he is entitled to the contract price. *People ex rel. Rodgers* v. *Coler*, 166 N. Y. 1; 59 N. E. Rep. 716.

Since it can hardly be denied that the parties, apart from statute, could make such a contract if they chose, it is difficult to see what difference it can make that they did it in obedience to a void statute. It cannot be said that a contract deliberately entered into lacks mutual consent simply because the parties supposed that they could not legally have made it on different terms. Even had it been shown that neither party would have allowed the stipulation to be inserted but for the belief that the statute was binding, this would have been at most an error of law, against which it is generally held that there is no relief in law or equity. 3 WILLISTON'S PARS. CONT. 353. Moreover, had it been a mistake of fact it could have been corrected only in equity, and even that would have been a doubtful question. *Stoddard* v. *Hart*, 23 N. Y. 556. It is to be noted that the supposed necessity of inserting the stipulation must have made all the bids higher. The decision is therefore incorrect, and seems to rest on no authority.

CONTRACTS — MORAL CONSIDERATION — PROMISE TO PERFORM VOID CONTRACT. — The plaintiff was induced by the defendant's promise of indemnity against loss to become surety for the defendant's husband. The promise was void on account of the disability of coverture. *Held*, that a subsequent promise made after the disability was removed, was void for lack of consideration. *Holloway's Assignee* v. *Rudy*, 60 S. W. Rep. 650 (Ky.).

The doctrine that an antecedent moral obligation is sufficient consideration to render a promise binding, was a creation of Lord Mansfield's. Just what moral obligation would be sufficient was never defined by him. That he meant to carry the doctrine beyond the familiar cases of infancy, bankruptcy, and the Statute of Limitations, which he used by way of illustration, is clearly shown by two of his later decisions. *Atkins* v. *Hill*, Cowp. 284 (1775); *Hawkes* v. *Saunders*, Cowp. 289 (1775). Although this new principle of Lord Mansfield's was viewed with disfavor, yet that it did find a place in the law for some time seems clear from two decisions, where a promise to perform a preceding void contract was held to be binding. *Barnes* v. *Hedley*, 2 Taun. 184 (1809); *Lee* v. *Muggeridge*, 5 Taun. 36 (1813). The doctrine has received no countenance in England since its repudiation in *Eastwood* v. *Kenyon*, 11 A. & E. 438 (1840). In this country it is now generally discredited, and the principal case is in accord with the weight of authority. *Ezall* v. *King*, 93 Ala. 470; *Austin* v. *Davis*, 128 Ind. 472. A contrary view, however, still finds some support. *Hemphill* v. *McClimans*, 24 Pa. St. 367; *Bentley* v. *Lamb*, 112 Pa. St. 480. By the Georgia Code a strong moral consideration is valid. Ga. Code (1895), § 3658.

CONTRACTS — SERVICES — DISCHARGE FOR CAUSE. — On a contract for one year's service at a yearly salary, the plaintiff was discharged for neglect of duty. *Held*, that he could recover on the contract the proportional amount of his salary, diminished by the amount of legal damage caused by his wrongful act. *Hildebrand* v. *American Fine-Art Co.*, 85 N. W. Rep. 268 (Wis.).

The plaintiff should not have recovered on the contract, because of his own breach; for in every contract of service a promise by the servant that he will perform his duty faithfully is implied. WOOD, MAS. & S. § 83. It is that breach which justifies the employer in refusing to go on with the contract. When the contract is divisible, the servant may recover wages for the work done, since the consideration for the promise to pay *pro rata* has been received. *Taylor* v. *Laird*, 1 H. & N. 266. *Cf.* LANG. SUM. CONT. 137, 166. When, however, there is but one promise to pay a fixed amount, that cannot be apportioned, and if the service has not been completed, there is an essential breach, and should be no recovery on the contract. *Turner* v. *Robinson*, 5 B. & Ad. 789. The nature of the plaintiff's right here seems to be *quasi*-contractual, and his recovery if any should be on a *quantum meruit*, but this is not generally allowed where the plaintiff's breach is wilful. 12 HARV. LAW REV. 284. The opposite view seems the better one. *Britton* v. *Turner*, 6 N. H. 481. The principal case reaches practically the same just result, but in allowing recovery on the contract, seems erroneous on principle, though supported by the weight of American authority in parallel cases. *Byrd* v. *Boyd*, 4 McCord, 246.

EQUITY — INTERPLEADER — TORT-FEASOR — IDENTITY OF CLAIM. — The plaintiff sued for the contract price of lumber sold and delivered to the defendant. One C claimed that the plaintiff had converted the lumber from him, and that he was entitled to receive the contract price from the defendant, who was allowed, under a statute, to pay the money into court and substitute C in his place as defendant. *Held*,

that this statutory interpleader is governed by the same rules as a bill of interpleader, that the original defendant could not have maintained such a bill, and that the plaintiff is therefore entitled to the money paid into court. *Coleman* v. *Chambers*, 29 So. Rep. 58 (Ala.). See NOTES, p. 61.

EVIDENCE — BURDEN OF PROOF — FACTS PECULIARLY WITHIN THE KNOWLEDGE OF THE DEFENDANT. — The plaintiff, while a passenger on the defendant's train, was injured by a red-hot cinder from the engine. *Held*, that when these facts are shown, the burden of proof on the question of negligence falls upon the defendant. *Texas, etc., R. R. Co.* v. *Jumper*, 60 S. W. Rep. 797 (Tex., Civ. App.).

If by burden of proof is meant the duty of establishing freedom from negligence upon all the evidence, the case is clearly wrong, since proof of the defendant's negligence is an essential part of the plaintiff's case. *Caldwell* v. *New Jersey, etc., Co.*, 47 N. Y. 282. But if, as is probable, the court means that the duty is cast upon the defendant of producing evidence, in the absence of which there is a presumption in the plaintiff's favor, the case is in accord with the weight of authority. *Spaulding* v. *Chicago, etc., Ry. Co.*, 30 Wis. 110. The underlying principle of these cases is well established, namely, that when facts are peculiarly within the knowledge of one of the parties, the duty of going forward with evidence in respect to such facts lies on that party. THAYER, PREL. TREAT. EV. 359; *King* v. *Burdett*, 4 B. & Ald. 140. The application to this class of cases seems sound. The plaintiff is practically without means of acquiring information as to the equipment of the company's engines, while the company is in possession of all the facts. There are however numerous decisions where the principle is not applied. *Pittsburg, etc., R. R. Co.* v. *Hixon*, 110 Ind. 225.

EVIDENCE — COLLATERAL MATTER — COMPLICATION OF THE ISSUE. — In an action by an abutting owner to recover for injuries to his property by the operation of a railroad, the plaintiff, in order to prove damage both by actual depreciation in value and by loss of the increase in value which would have occurred but for the presence of the railroad, offered expert testimony as to the general course of values in other property in the neighborhood. *Held*, that the evidence is admissible. *Levin* v. *New York, etc., Ry. Co.*, 165 N. Y. 572; 59 N. E. Rep. 261.

The case raises the question as to how far evidence of collateral or extrinsic matter is admissible in proof of the fact in issue. The general principle applicable to such cases is that if the evidence is remote or conjectural, or unnecessarily complicates the issue, it will be excluded though logically probative. The question is one of common sense merely, the test being whether the practical objection that the evidence confuses or prejudices the jury is of sufficient weight to offset its logical value. THAYER, PRELIM. TREAT. EV. 516–518. Thus in each case the decision lies largely within the sound discretion of the court, and opposite results may often be reached though the same rule of law is applied. *Paine* v. *Boston*, 4 Allen, 168; *Petition of Thompson*, 127 N. Y. 463. The method of proof adopted in the principal case, though somewhat objectionable as raising collateral issues, is simple, logical, and indeed often necessary. Upon another view of the case the evidence might have been admitted as a statement by an expert of the reasons for his opinion. *Barber* v. *Merriam*, 11 Allen, 322.

EVIDENCE — CRIMINAL TRIAL — TESTIMONY AT FORMER TRIAL. — *Held*, that the prisoner was not entitled to introduce testimony given at his former trial by a witness since deceased. *Montgomery* v. *Commonwealth*, 37 S. E. Rep. 841 (Va.).

This decision follows the *dictum* in *Finn* v. *Commonwealth*, 5 Rand. 708, that in criminal actions the testimony given at a former trial by a witness since deceased cannot be introduced. This seems to be law in but two other jurisdictions. *United States* v. *Sterland*, Fed. Cas. No. 16387 (1858); *Cline* v. *State*, 36 Tex. Cr. App. 320 (1896). The Texas case, in which the evidence was offered by the prosecution, was decided on the ground that the admission of such testimony violates the constitutional provision that the prisoner shall have the right to confront the witnesses against him. It is, however, generally held that this provision is only an affirmance of the common law right of the accused that all testimony shall be delivered in his presence in open court, and is subject to the same exceptions and limitations, imposed by the necessities of the case. *State* v. *McO'Blenis*, 24 Mo. 402; 1 GREEN. EV., 16th ed., § 163 f. Moreover the constitutional provision, even under the Texas interpretation, does not seem to apply in terms to the case where the accused seeks to prove the testimony of witnesses in his favor, and even if it were applicable in terms, as it exists solely for the protection of the accused, it is difficult to see what right the prosecution would have to object to its waiver by him.

EVIDENCE — DYING DECLARATIONS — INCORPORATION OF WRITTEN STATEMENT. — The declarations of the deceased, made in her last sickness, but before she had given up hope, were reduced to writing. Later, after she had lost hope, she declared that the written statement was correct. *Held*, that the writing was properly admitted as her dying declaration. *Wilson* v. *Commonwealth*, 60 S. W. Rep. 400 (Ky.).

The admissibility of dying declarations was formerly supported on the theory that the circumstance of impending death is of as great solemnity as an oath. *Woodcock's Case*, 1 Leach, C. C. 500. But the lack of an oath is not the only objection to such testimony, since its admission is inconsistent with the defendant's rights of cross-examination and of being confronted by his accusers. *Marshall* v. *Chicago, etc., Ry. Co.*, 48 Ill. 475. In spite of these weighty objections, however, this exception to the hearsay rule is properly held to be justified by the obvious necessity of the case. *Railing* v. *Commonwealth*, 110 Pa. St. 100. The declarations may be either written or oral. *Rex* v. *Reason*, 1 Strange, 499. An oral repetition *in extremis* of a previous statement would therefore clearly be admissible, and the corroboration in the principal case may be regarded as practically a restatement and adoption of the former declaration. Under similar circumstances, the admission of the writing has been so justified. *State* v. *McEvoy*, 9 S. C. 208. This reasoning seems sound and amply sufficient to support the decision.

EVIDENCE — RES GESTA — NUISANCE. — The plaintiff filed a bill to enjoin the defendant from storing cheese on his premises adjoining those of the plaintiff. Testimony of the plaintiff's janitor that the plaintiff's tenants had left, and had alleged the smell of the cheese as the reason for their departure, was rejected, and the injunction was refused. The plaintiff excepted to this ruling *inter alia*. *Held*, without mentioning the question of evidence, that the exceptions must be overruled. *Smith* v. *Crawford*, 56 N. Y. App. Div. 136.

Since no special damages were alleged in the complaint the fact of the tenants' leaving could be important only when explained by what the tenants said, since otherwise it could afford no sufficient inference as to the existence of an offensive smell. Therefore it should not be admitted in evidence. *Lewis* v. *Smith*, 107 Mass. 334. On the other hand, what the tenants said to the janitor, being reported by him, is hearsay and by itself inadmissible. *Stapylton* v. *Clough*, 2 E. & B. 933. In order to admit a declaration otherwise incompetent, as part of the *res gesta*, that is, as being part of or explaining an act, the act must be admissible alone. *Wright* v. *Tatham*, 4 Bing. N. C. 489, 498. Here therefore the act cannot make the declarations competent evidence, and consequently the janitor's testimony was properly excluded. *Gresham Hotel Co.* v. *Manning*, 1 Ir. Rep. C. L. 125.

EVIDENCE — TESTIMONY AT FORMER TRIAL — TEST OF ADMISSIBILITY. — The plaintiff in a civil action sought to introduce the testimony of a witness in a former trial between the same parties on the same issue, the witness being out of the jurisdiction but alive. *Held*, that the evidence is not admissible. *Wabash R. R. Co.* v. *Miller*, 59 N. E. Rep. 485 (Ind.).

It is established that such testimony is admissible in civil cases where the witness is dead. *Wright* v. *Tatham*, 1 A. & E. 3; *Yale* v. *Comstock*, 112 Mass. 267. The principal case limits the doctrine strictly to cases of death. There is some authority for this view. *Le Baron* v. *Crombie*, 14 Mass. 233. It is slight however, and the tendency of recent authority is towards a liberal rule, including insanity, illness, absence through the opponent's procurement, disappearance, and absence from the jurisdiction; in short, any circumstances under which equity would allow a deposition to be taken for the purposes of a common law trial. 1 GREENL. EV., 16th ed., § 163ff. There are many troublesome distinctions in the cases and varying degrees of strictness. *Berney* v. *Mitchell*, 34 N. J. Law, 337. But the weight of authority holds the testimony admissible where the witness is out of the jurisdiction. *Minneapolis Mill Co.* v. *Minneapolis, etc., R. R. Co.*, 51 Minn. 304. The case therefore seems contrary not only to the trend of modern cases, but to the majority of actual decisions on the precise point involved.

INSURANCE — BENEFIT SOCIETIES — CHANGE OF BENEFICIARY. — One A, being a member of a benefit society, had the certificate made out to his wife. Later he wrote to the secretary, complying with the requirements for taking out a new certificate, and asking that such certificate be made out to his mother. The rules of the society made no provision for change of beneficiary. Before the new certificate had been

issued A died. *Held*, that his mother is entitled to the benefit. *Fink* v. *Delaware, etc., Society*, 57 N. Y. App. Div. 507.

By the New York Code, and by the usual rule, a member of a benefit society may change his beneficiary without the consent of the latter. N. Y. R. S. (1896), vol. 2, p. 1671; *Beatty's Appeal*, 122 Pa. St. 428. Such a change is of course a novation to which an assent by the association is necessary. Ordinarily the laws of the association or the certificate contain provisions in which an express or implied assent is involved. In the principal case, however, there were no such provisions. Nevertheless, in view of the almost universal practice of such associations, it is fair to imply an assent, since it is a clear advantage to the member, and cannot hurt the society, which would naturally try to make itself as attractive as possible; and in practice such an assent is implied. *Masonic Ben. Ass'n* v. *Bunch*, 109 Mo. 560; NIBLACK, ACCID. INS. 412. Consequently the new beneficiary in the principal case is entitled, since, when no method of changing is provided, a letter mailed to the company directing payment to a new beneficiary completes the change. *Hirschel* v. *Clark*, 81 Iowa, 200.

INSURANCE — STANDARD POLICY — PROOF OF LOSS. — The Minnesota standard fire insurance policy stipulates that proof of loss shall be furnished forthwith, but does not expressly say that compliance is necessary to recovery, nor provide for forfeiture on non-compliance. *Held*, that the insured may recover on furnishing proof of loss at any time within the two years limit. *Mason* v. *St. Paul Ins. Co.*, 85 N. W. Rep. 13 (Minn.).

The most natural construction of such a stipulation is that compliance is a condition precedent to any recovery. *Baker* v. *German Ins. Co.*, 124 Ind. 490. A provision for forfeiture would compel the insured to furnish proof of a loss too trivial to make it worth while to collect the insurance. In the principal case, it is admitted that the stipulation makes a condition precedent, but it is held that the provision as to time may be disregarded. There is considerable authority for this view. *Steele* v. *German Ins. Co.*, 93 Mich. 81. The word "forthwith," however, has a recognized legal meaning, namely, within a reasonable time. *Scammon* v. *Germania Ins. Co.*, 101 Ill. 621. It is difficult on principle to justify a disregard of this part of the condition, while effect is given to the rest.

INTERNATIONAL LAW — ACTION BROUGHT BY SOVEREIGN — CROSS-LIBEL. — *Held*, that a cross-libel cannot be entertained in answer to a libel filed by the United States for injuries to a government vessel resulting from a collision. *Bowker* v. *U. S.*, 105 Fed. Rep. 398 (Dist. Ct., N. J.). See NOTES, p. 59.

JUDGMENTS — RES JUDICATA — HABEAS CORPUS PROCEEDINGS. — *Held*, that the dismissal of a writ of *habeas corpus* by the federal courts of one circuit does not render the question *res judicata* so as to preclude its reëxamination by the courts of another circuit in subsequent *habeas corpus* proceedings instituted therein by the same petitioner. *Carter* v. *McClaughry*, 105 Fed. Rep. 614 (Circ. Ct., D. Kan.).

The decision that the doctrine of *res judicata* is not applicable to proceedings in *habeas corpus* is in accord with the overwhelming weight of authority. *In re Snell*, 31 Minn. 110. The cases offer no satisfactory explanation of this peculiarity, but the reason seems to be that at common law neither the prisoner in whose behalf the writ was issued nor the petitioner who acted solely for him, was a party to the subsequent proceedings. The issue as to the lawfulness of the detention was not between the prisoner or the petitioner and the keeper, but between the court and the keeper. See 14 HARV. LAW REV. 612. If the keeper satisfied the court, the prisoner was remanded and no appeal was allowed. HURD, HABEAS CORPUS, ch. xi. The petitioner might however set another court in motion, and as the new writ raised the issue between different parties, the doctrine of *res judicata* could not be invoked. Where, as in the federal courts and in many jurisdictions, the prisoner is by statute allowed an appeal and thus made a party to the proceedings, there seems to be no good reason why the doctrine of *res judicata* should not be applied. *Perry* v. *McLendon*, 62 Ga. 598.

PERSONS — SUIT BY INFANT — DECREASED EARNING CAPACITY. — An infant sued through his mother, as guardian, for personal injuries. The mother, a widow, was held to be entitled to his services. *Held*, that damages may be given for decreased earning capacity before as well as after majority. *Chesapeake & O. Ry. Co.* v. *Davis*, 60 S. W. Rep. 14 (Ky.).

There is an apparent analogy between this case and that of damage to the earning capacity of a married woman, for which, by the strict common law, an action lay by the

husband alone, but not by the husband and wife jointly. *Barnes* v. *Hurd*, 11 Mass. 59. The case of the infant is distinguishable, however, since it is admitted that the parent can emancipate the child, either generally, or for particular purposes, as by allowing him to receive for himself a part of his earnings. *Donegan* v. *Davis*, 66 Ala. 362. Accordingly there seems no difficulty, where the guardian is also the parent, in allowing him to elect to recover damages to the earning capacity of the child during minority for the benefit of the child rather than for himself. *Abeles* v. *Bransfield*, 19 Kan. 16. In such a case the parent cannot afterwards, as an individual, recover for loss of services. *Baker* v. *Flint, etc., Ry. Co.*, 91 Mich. 298. And where he has already recovered for loss of services the reasoning above does not apply, and the damages in question cannot be recovered in the suit brought as guardian. *Houston, etc., Ry. Co.* v. *Miller*, 51 Tex. 270. The decision is therefore sound and supported by authority.

PROPERTY — CURTESY — NATURE OF THE ESTATE. — A married woman, who had issue living, inherited an estate in fee before the modern married women's property acts. *Held*, that the husband took an immediate life estate in his own right. *Dawson* v. *Edwards*, 59 N. E. Rep. 590 (Ill.).

All the authorities agree that a husband gets an indefeasible interest in the lands of his wife when issue is born. During the wife's life he is called tenant by curtesy initiate. But as to the exact nature of this interest there is a conflict. On the one hand it is contended that the husband, after issue born, is seised of a life estate in his own right, and that the interest of the wife is a reversionary one expectant upon the life estate of her husband. *Foster* v. *Marshall*, 22 N. H. 491; *Shortall* v. *Hinckley*, 31 Ill. 219. On the other hand it is contended that the husband remains jointly seised with the wife during her life. *Melvin* v. *The Proprietors, etc.*, 16 Pick. 161. The question is one of some nicety, and the law seems to contain no analogy upon which a result can be reached, but the latter of the two views seems more in accord with the ancient conceptions of the common law, upon which the solution must depend. 2 POLL. AND MAIT., HIST. ENG. LAW, 405–418.

PROPERTY — LIENS — ASSIGNMENT. — A livery stable keeper, having a lien on a horse for board, assigned the claim, together with the horse as security therefor, to the defendant. The owner of the horse brought replevin. *Held*, that a lien, being a purely personal right, is not assignable, and that the attempted assignment in the present case destroyed the lien and constitutes no defence. *Glascock* v. *Lemp*, 59 N. E. Rep. 342 (Ind.). See NOTES, p. 70.

PROPERTY — PUBLIC PONDS — RIGHTS OF LITTORAL OWNERS. — *Held*, that a littoral owner on a public pond may obtain an injunction to restrain the taking of ice, for the purpose of sale, in such quantities as to reduce the natural level. *Sanborn* v. *People's Ice Co.*, 84 N. W. Rep. 641 (Minn.). See NOTES, p. 68.

PROPERTY — RECORDING ACTS — DEFECTIVE ACKNOWLEDGMENT. — The defendant claimed title to land under a deed of trust from A, acknowledged before a notary, who, being attorney for the beneficiary, was disqualified by the law of the state. The plaintiff claimed as judgment creditor on a subsequent execution against A, in a jurisdiction where a creditor is in the position of a purchaser for value. *Held*, that, the certificate being valid on its face, the record was constructive notice to the plaintiff, and he cannot recover. *Southwestern Mfg. Co.* v. *Hughes*, 60 S. W. Rep. 684 (Tex., Civ. App.).

Most registration acts, including that of Texas, require deeds to be properly acknowledged as well as recorded. TEX. R. S. (1895), § 4640. An acknowledgment is void if taken by one in interest, *Hammers* v. *Dole*, 61 Ill. 307, and the rule is applied in Texas to an attorney for either party. *Sample* v. *Irwin*, 45 Tex. 567. The principal case qualifies that rule where the certificate is valid on its face. To what extent such a certificate shall be conclusive proof of the legality of the acknowledgment is not entirely certain, but the general tendency is to protect one who relies on the certificate. WEBB, RECORD TITLE, §§ 87–89; note, 1 Am. Dec. 81. In several states however, the certificate is by statute made *prima facie* evidence only. 1 HILL'S CODE (WASH.) § 1436. To preserve the reliability of the records, public policy certainly makes it important that a recorded instrument shall in general not be impeachable by extrinsic evidence, and the result here reached seems highly desirable. *Bank of Benson* v. *Hove*, 45 Minn. 40. *Cf. Hitz* v. *Jenks*, 123 U. S. 297.

PROPERTY — WILLS — DEVISE OF A CORPSE. — The testator left a will urging that the manner, time, and place of his burial should be according to the defendant's wishes and directions. The defendant was in possession claiming under the will, and the widow and daughter of the deceased brought suit to recover the body. *Held*, that one has no property in a dead body so that he can dispose of it by will, the custody and right of burial belonging, in the absence of statutory provision, to the next of kin. *Enos* v. *Snyder*, 63 Pac. Rep. 170 (Cal., Sup. Ct.). See NOTES, p. 64.

SALES — CONTRACTS — STOCKS CARRIED ON MARGINS. — Brokers carrying stocks on a margin for a customer, under a contract made in Massachusetts, were adjudicated bankrupts on a voluntary petition. *Held*, that the customer, without tendering the rest of the purchase money, can prove a claim for the value of the contract at the date of the petition. *In re Swift*, 105 Fed. Rep. 493 (Dist. Ct., Mass.).

By the prevailing view a broker is pledgee of stocks carried by him on a margin, the customer having legal title therein. JONES, PLEDGES, 495. This view is hardly consistent with the custom of brokers to hypothecate stocks thus held. *Lawrence* v. *Maxwell*, 53 N. Y. 19. The principal case adopts a theory simpler and nearer to business practices, that the broker owns the stocks absolutely, but is under a contractual obligation to deliver on tender of the balance of the price. *Weston* v. *Jordan*, 168 Mass. 401. Normally tender fixes the time for delivery, but if it becomes apparent that the stocks will not be delivered, as a tender would be nugatory, performance is immediately due. *Cort* v. *Ambergate, etc., Ry. Co.*, 17 Q. B. 127. This rule seems to cover the principal case, for as the filing of the petition showed that the brokers would not perform, liability on the contract instantly accrued. Apparently neither the doctrine of anticipatory breach, *Roehm* v. *Horst*, 178 U. S. 1, nor the question of the proof of contingent claims was involved.

SURETYSHIP — GUARANTY — NECESSITY OF NOTICE. — The defendant guaranteed the payment of rent by the plaintiff's tenant. The plaintiff gave the defendant no notice of the default till long after it occurred, and the defendant had been put in a worse position in consequence. *Held*, that the facts show no defence to an action on the guaranty.. *Welch* v. *Walsh*, 59 N. E. Rep. 440 (Mass.). See NOTES, p. 65.

SURETYSHIP — STATUTE OF FRAUDS — PROMISE TO PAY THE DEBT OF ANOTHER. — The plaintiff made a sale of lumber to X, retaining a lien, and, X being unable to pay, refused to deliver the goods. Thereupon the defendant, who was president of a corporation holding an unrecorded chattel mortgage on the lumber from X, induced the plaintiff to deliver by guaranteeing payment. *Held*, that the promise need not be in writing, within the Statute of Frauds, as a promise to pay the debt of another. *Choate* v. *Hoogstraat*, 105 Fed. Rep. 713 (C. C. A., 7th Cir.).

In general, in both England and America, wherever the promisor bears the relation of guarantor to the debtor, the statute applies. BROWNE, ST. FR., 5th ed., § 193. But there is a class of cases in which the promisor, having an interest in the property which gave rise to the debt, desires to free his interest from the creditor's claim, where it is generally held that the statute does not apply. *Williams* v. *Leper*, 3 Burr. 1886; *Fish* v. *Thomas*, 5 Gray, 45. Strictly, even these cases come within the statute. The promisor however, having received a benefit from the creditor's reliance on his promise, should be liable in *quasi*-contract to the extent of the benefit received, by analogy to settled cases. *Miller* v. *Roberts*, 169 Mass. 134. Practically, this would in general reach the same result. But in the principal case the corporation, not the promisor, owned the mortgage, and therefore he was benefited only as one of the stockholders, and should be liable, if at all, only to the extent of his benefit. The case, however, is a not unnatural extension of the anomalous rule above referred to.

TORTS — JOINT WRONGDOERS — INDEMNITY. — An employee of the plaintiff railroad company recovered against it for injuries due to the dangerous condition of a car received in transit from the defendant railroad, which had negligently failed to inspect the car. The plaintiff had inspected it, but through negligence had failed to discover the defect. *Held*, that the plaintiff is not entitled to recover over against the other road. *Galveston, etc., Ry. Co.* v. *Nass*, 59 S. W. Rep. 870 (Tex., Sup. Ct.).

The rule that there is neither contribution nor indemnity between joint wrongdoers is said not to apply unless the parties knew or must be presumed to have known that they were acting wrongfully. *Adamson* v. *Jarvis*, 4 Bing. 66, 73. Neither can the decision go on the ground that the defendant company was not the cause of the injury to the

employee, for by the better view he could have recovered against that company. *Pennsylvania R. R. Co.* v. *Snyder*, 55 Oh. St. 342; *contra*, *Glynn* v. *Central R. R. Co.*, 175 Mass. 510. The decision however is quite correct, for the judgment recovered by the employee is to be regarded as damage caused to one wrongdoer by the contributing negligence of himself and another. Ordinarily any suit by one against the other would be barred by contributory negligence, but if one later than the other was in such a position that, by the exercise of due care, he could have discovered and avoided the danger, he, as between the two, must bear the whole loss. *Nashua, etc., Co.* v. *Worcester, etc., R. R.*, 62 N. H. 159. The present decision correctly throws the loss on the party ultimately liable. The cases in which there is a warranty should be distinguished. *Boston Woven Hose, etc., Co.* v. *Kendall*, 59 N. E. Rep. 657 (Mass.).

TORTS — LEGAL CAUSE — PLAINTIFF'S ILLEGAL ACT. — The plaintiff's launch was anchored in violation of a treasury regulation forbidding anchorage of vessels within 150 feet of any wharf. The defendant's lighter, in passing, picked up the anchor chain and drew the launch into collision. *Held*, that the plaintiff cannot recover. *Foley* v. *McKeever*, 56 N. Y. App. Div. 517.

If the decision rests on the theory that the plaintiff's own wrongful act was the proximate cause of his injury, it is obviously sound. Apparently however, the ground taken by the majority is that the plaintiff's violation of the law is conclusive against his right to recover, since "except for the chain the damage would not have occurred." Some authority for this proposition is to be found. *Bosworth* v. *Swansey*, 10 Met. 363; *Gregg* v. *Wyman*, 4 Cush. 322. But the weight of authority is contrary, and the proposition seems unsound in principle. *Norris* v. *Litchfield*, 35 N. H. 277; *Hamilton* v. *Goding*, 55 Me. 419. Penalties for the violation of statutes are fixed by the state, and courts have no power to increase them by losses of property caused solely by the tortious act of another. *Philadelphia, etc., R. R. Co.* v. *Philadelphia, etc., Towboat Co.*, 23 How. 209. Nor can the independent public wrong of the plaintiff avail a defendant as an excuse for his own tort. Only where such wrong is a contributing cause and not merely a condition of the injury should the recovery be barred.

TRUSTS — BANKS — COLLECTIONS. — *Held*, that after the proceeds of a note deposited for collection have been received by the bank, they are held in trust for the depositor, who is a preferred creditor in case of bankruptcy. *State* v. *Bank of Commerce*, 85 N. W. Rep. 43 (Neb.).

The case follows a previous Nebraska decision. *Capital Nat. Bank* v. *Coldwater Nat. Bank*, 49 Neb. 786. It is held that at the time of the deposit the parties intended the note to be held in trust, and that nothing has occurred subsequently sufficient to alter the trust relation. *Nurse* v. *Satterlee*, 81 Iowa, 491. But most of the cases cited in support of the doctrine rest on other circumstances, such as the bank's insolvency at the time of deposit. *Cragie* v. *Hadley*, 99 N. Y. 131. The prevalent rule is that the moment a solvent bank receives the proceeds, the relation of trust is changed to that of debtor and creditor. *Nonotuck Silk Co.* v. *Flanders*, 87 Wis. 237. This rule, it is submitted, is more in accord with the general understanding of the business community, which expects the money collected to be treated like an ordinary deposit. *Marine, etc., Bank* v. *Fulton, etc., Bank*, 2 Wall. 252, 256. Since banks as a rule charge nothing for collecting, they cannot be expected to hold the proceeds separate, as trust funds. Reason and the weight of authority seem opposed to the decision in the principal case.

TRUSTS — LIFE TENANT AND REMAINDERMAN — PREMIUM ON BONDS. — *Held*, that where there is nothing in the surrounding circumstances to show a different intention on the part of the creator of a trust, it is the duty of a trustee, who has invested the trust fund in bonds purchased at a premium, to make such deductions from the income payable to the life beneficiary as will make the principal of the trust fund whole when the bonds mature. *New York, etc., Co.* v. *Baker*, 165 N. Y. 484; 59 N. E. Rep. 257.

The ideal trust investment is one that yields a fair rate of interest to the life beneficiary and secures the *corpus* intact to the remainderman. The investment of a trust fund in bonds purchased at a premium, and held until maturity, involves the loss of both the premium and the interest upon it. A court sanctioning such investments should apportion the loss fairly between the life beneficiary and the remainderman. Neither should have any advantage at the expense of the other. Cf. *Kinmouth* v. *Brigham*, 5 Allen, 270. In losing interest upon the amount paid as premium the life beneficiary bears his share of the loss, and the premium itself should come out of the

corpus. 34 ALB. L. J. 144; *Boyer* v. *Chauncey*, 12 Pa. Super. Ct. 526. The decision, in throwing the entire burden upon the life beneficiary, seems unjust. The doctrine of the case, however, appears to be law in Massachusetts. *New England Trust Co.* v. *Eaton*, 140 Mass. 532. Although the point seems never to have been raised, it is perhaps arguable that, except in the absence of other safe and remunerative investments, the purchase of bonds at a premium, with the intention of holding until maturity, is not a proper administration of the trust estate.

REVIEWS.

AN EPITOME OF PERSONAL PROPERTY LAW. By W. H. Hastings Kelke, M. A., London: Sweet and Maxwell, Limited. 1901. pp. xv, 144. Mr. Kelke has certainly succeeded in crowding an astonishing amount of law into a very limited space. His work has also the merits of accuracy, due regard for proportion, and clearness of statement. First in order are considered the different kinds of absolute and qualified ownership. Then there is a discussion of the more important kinds of choses in action known to the English law, — negotiable instruments, annuities, insurance policies, debentures, and partnership and company shares. Mr. Kelke sketches briefly the English common law and statutory rules which govern such kinds of property, and brings out clearly the essential attributes of each variety. After touching upon other and less important matters, the book closes with a survey of bankruptcy and administration. The American reader may at first glance think the book rather too much given up to English statutory changes; yet, as a rule, it is not difficult to separate from the whole text the more general common law principles. At any rate, as an admirably suggestive summary of the present state of the English law of personal property, the book ought to prove highly useful.

AN EPITOME OF ROMAN LAW. By W. H. Hastings Kelke, M. A., London: Sweet and Maxwell, Limited. 1901. pp. vii, 268. This little book furnishes us in a very small space with all that is essential for a general understanding of Roman law. In the opening chapter the history of the law is briefly, and, it would appear, accurately, given. A long chapter is then devoted to Family Law, and another to the allied subject of Tutors and Curators. Of course, the larger portion of the book is taken up by the chapters on *Jus Rerum*, — Property Law, Succession Law, and Contract Law. Delictal obligations are then briefly considered. And the final chapter treats at considerable length the subject of Procedure. Excellent notes explain the technical terms and phrases used, and an appendix gives numerous references to standard authorities on particular topics in the law which would prove useful to students desiring a more extended investigation. It must be confessed that the book is not easy reading owing to its extreme conciseness. One may well question whether conciseness gained by such methods as the entire omission of articles and the systematic abbreviation of ordinary words is entirely without disadvantages. But the book is obviously intended to be used in preparing for examinations, and for this purpose it leaves